

STATE OF MICHIGAN  
COURT OF APPEALS

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

JONATHAN DARNELL BELSER,

Defendant-Appellant.

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UNPUBLISHED

September 14, 2004

No. 247214

Wayne Circuit Court

LC No. 02-014130-01

Before: Donofrio, P.J., and White and Talbot, JJ.

MEMORANDUM.

Defendant was charged with armed robbery, MCL 750.529, and possession of a firearm during the commission of a felony, MCL 750.227b. Following a bench trial, defendant was convicted of armed robbery, for which he was sentenced to twenty-seven months to fifteen years in prison. Defendant appeals his conviction as of right and we affirm. This appeal is being decided without oral argument pursuant to MCR 7.214(E).

Defendant first contends that the court erred in its application of the law to the facts because it failed to draw an inference that a missing surveillance tape would have supported his testimony that he committed a lesser offense. We disagree.

A party's intentional destruction of material evidence within its control creates a presumption that the evidence would have been adverse to that party if he was acting fraudulently in an effort to suppress the truth. *Lagalo v Allied Corp (On Remand)*, 233 Mich App 514, 520; 592 NW2d 786 (1999). A party's failure to produce material evidence under its control where there is no reasonable excuse for its nonproduction permits an inference that the evidence would have been adverse to that party. *Botsford Gen Hosp v Citizens Ins Co*, 195 Mich App 127, 144-145; 489 NW2d 137 (1992); *Berryman v K Mart Corp*, 193 Mich App 88, 101-102; 483 NW2d 642 (1992). Because the inference is permissive, not mandatory, the factfinder is not required to draw such an inference. *Brenner v Kolk*, 226 Mich App 149, 155-156; 573 NW2d 65 (1997).

Because the evidence showed only that the surveillance tape was lost and defendant has not shown that it was intentionally destroyed, the court could, but was not required to, infer that the missing videotape would have shown the commission of a lesser offense. Therefore, defendant's claim that the court was required to draw such an inference is without merit.

Defendant also takes issue with the trial court's findings regarding the victim's credibility. Because the trial court is in the best position to judge credibility, this Court will not substitute its judgment for that of the trial court but will defer to the trial court's resolution of factual issues that involve the credibility of witnesses. *People v Cartwright*, 454 Mich 550, 555; 563 NW2d 208 (1997); *People v Martin*, 199 Mich App 124, 125; 501 NW2d 198 (1993).

Defendant next contends that the prosecutor's failure to produce the surveillance videotape violated his due process rights. Because defendant failed to show that the missing tape was in fact exculpatory or that it was destroyed in bad faith, *People v Hunter*, 201 Mich App 671, 677; 506 NW2d 611 (1993); *People v Johnson*, 197 Mich App 362, 365-366; 494 NW2d 873 (1992), defendant has failed to establish a right to relief on the basis of this unpreserved error. *People v Carines*, 460 Mich 750, 763-764; 597 NW2d 130 (1999).

Affirmed.

/s/ Pat M. Donofrio  
/s/ Helene N. White  
/s/ Michael J. Talbot